

232030

170th anniversary
Nauman Smith
ATTORNEYS AT LAW

Please Reply to:
P. O. Box 840
Harrisburg, PA 17108-0840

Benjamin C. Dunlap, Jr.
E-mail: bdunlapjr@nssh.com
Telephone Extension 21

March 12, 2012

Filed Electronically

Rachel Campbell
Director, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

RE: Docket No. AB 167 (Sub-No. 1191X)
Consolidated Rail Corporation -- Abandonment
Exemption -- in Philadelphia, Pennsylvania

Docket No. AB 55 (Sub-No. 710X)
CSX Transportation, Inc. -- Discontinuance
Exemption -- in Philadelphia, Pennsylvania

Docket No. AB 290 (Sub-No. 552X)
Norfolk Southern Railway Company -- Discontinuance
Exemption -- in Philadelphia, Pennsylvania

ENTERED
Office of Proceedings
MAR 12 2012
Public Record

Dear Ms. Campbell:

I am writing in initial response to the Offer of Financial Assistance ("OFA") filed by CNJ Rail Corporation ("CNJ") and Eric S. Strohmeyer (Individually) ("Strohmeyer") (jointly "Offerors") with the Board late in the day on Friday, March 9, 2012, for the portion of the rail line from MP 0.00 to MP 2.80. I am making this response on behalf of Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. ("CSXT") and Norfolk Southern Railway Company ("NSR") (jointly "Applicants").

The purpose of this letter is to provide initial reasons why the OFA does not satisfy the standards of 49 U.S.C. § 10904(d) for purposes of instituting negotiations, and that therefore the Director should reject the OFA and not further postpone the March 19, 2012, effective date of the exemption authority for this portion of the line,¹ pursuant to the Director's authority under 49 CFR § 1152.27(e)(2). Due to the short time for review of the OFA prior to the Director making her initial determination as well as the fact that Applicants have not yet received any of the Exhibits to the OFA, including the financial statements purportedly attached thereto, Applicants reserve any and all rights they may have to make further legal and factual arguments, depending upon the Board's and Offeror's subsequent actions and further development of the proceeding.

¹ It is noted that exemption authority for that portion of the line from MP 2.80 to MP 2.98 was granted, effective March 2, 2012, pursuant to the Board's Decision of that date in this proceeding.

Underlying most of the fundamental flaws of the OFA is the fact that Conrail does not own and merely has operating rights on 2.7 miles of the 2.8 mile segment on which CNJ and Strohmeier make their OFA. There is no dispute that the 1.75 mile portion of the line from MP 0.95 to 2.70, denominated by Offerors as Segment # 2 in the OFA, was sold to the City of Philadelphia ("City") in 1978 and was operated on, if at all, pursuant to an Operating Agreement dated June 28, 1978, which was provided to the Offerors and the Board as Exhibit "A" in Conrail's Response to Information Requests of Strohmeier and CNJ. In addition, Conrail's present rights, if any, to operate on that portion of the former line from MP 0.00 to MP 0.95, denominated as Segment # 3 in the OFA,² would be pursuant to a July 18, 1871, agreement between the City and the predecessor railroad on this line, as explained in ¶ 6 of Conrail's Response to the Additional Information Requests of Strohmeier and CNJ. While Conrail has been unable to locate this agreement in its records, it is clear that the underlying real estate on this portion of the line is owned by the City, and the predecessor railroad most likely only had operating rights for this portion of the line.

The OFA on its surface raises serious issues in regard to factors that the Board frequently considers in deciding whether to exempt a line slated for abandonment from Section 10904. Those are operational feasibility, community support, and the ability to conduct rail operations without interfering with current or planned public purpose uses of the line. *See e.g., Union Pac. R.R. Co. – Abandonment Exemption – In Lassen County, CA, and Washoe County, NV*, STB Docket No. AB-33 (Sub-No. 230X), 2008 WL 4281989, at *2 (served Sept. 19, 2008) (articulating showing required to avoid exemption); *see also, CSX Transp., Inc. – Abandonment Exemption – In Glynn County, GA*, STB Docket No. AB-55 (Sub.No. 697X), 2009 WL 1967549, at *3 (served July 9, 2009) (same); *Los Angeles County Metro. Transp. Auth. – Abandonment Exemption – in Los Angeles County*, STB Docket No. AB-409 (Sub.No. 5X), slip op. at 3 (served June 16, 2008) (same).

Here, the Offerors have not noted any contact whatsoever with the property owner for the majority of the line on which they would operate, *i.e.*, the City of Philadelphia. It is anticipated that the City will raise strong objections to any resumption of operations on this rail line in its public streets after 30 years of non-use and the changed character of much of the area through which the line is located.

It is likewise anticipated that the City would object to the resumption of operations on the line due to serious public safety considerations. CNJ and Strohmeier themselves admit to "significant safety issues" due to operating trains against one-way traffic on a portion of the line. *See* OFA at pg. 14-15. Nor do CNJ and Strohmeier even consider in their OFA that the line traverses no less than 21 crossings with other City streets, regarding which the Pennsylvania Public Utility Commission ("PUC") would have jurisdiction. *See* 66 Pa.C.S. § 2702. The PUC could order flashing light signals at these crossings and at a minimum is likely to order interconnection with any traffic signals at these crossings to ensure

² It is to be noted that Strohmeier and CNJ do not address the value of any track material which still may be owned by Conrail in Segment # 3, instead claiming in paragraph 9 of the OFA their belief that this section of the line would have a Negative Liquidation Value, without any further explanation thereof.

that opposing traffic receives a red signal when a train is approaching the crossing. Such modifications to so many crossings could easily exceed \$1 million dollars alone.

It is anticipated that the City would take the position that the operating rights under the June 28, 1978, Operating Agreement with Conrail, as well as any operating rights under the July 18, 1871, agreement between the City and the predecessor railroad, would not be assignable to CNJ and Strohmeier without the City's concurrence. In addition, Pennsylvania statutory law at 53 P.S. § 1911 provides a municipality the right to issue permits determining the manner in which a public utility may place railway tracks on a municipal street.

In regard to the operational feasibility of the line, CNJ and Strohmeier misrepresent to the Board the potential of tying the line into the Philadelphia Beltline at Noble Street. See OFA ¶¶ 28-29 on pages 8-9. As is clearly shown in Conrail's answer to Question 2 in its Response to the Additional Information Requests and Exhibit "A" attached thereto, any potential connection with the Beltline on Delaware Avenue via Noble Street has been negated by the conveyance of most of the intervening property to the Trustees of the North Philadelphia Railroad and the subsequent sale of that property. Even a cursory examination of the Valuation Map referenced above demonstrates that Offerors completely misrepresent the potential for any connection with the Philadelphia Beltline via Noble Street.

Likewise, adding to the infeasibility of operations on this line is the fact that the connecting track and switch restorations with the Richmond Industrial Track on the north end of the offer area would require an interchange agreement, as Offerors acknowledge at page 15 of the OFA. However, with the highly speculative nature of any services on the line, Conrail would oppose paying for any of the extensive costs for restoration of this connection to accommodate an interchange where none previously existed.

In addition, the 20-foot width of the right-of-way that the Offerors propose to purchase on the Conrail-owned line segment from MP 2.70 to MP 2.80,³ denominated as Segment #1 in the OFA, is so narrow that it would not even comply with the PLUC's side clearance regulations at 52 Pa. Code § 33.122(b). Nor would this narrow width provide for any access to the rail line in case of emergencies or needed maintenance activities.

The statutory provisions at 49 U.S.C. § 10907(a)(2) define a "financially responsible person" in part as a person who "is able to assure that adequate transportation will be provided over such a line for a period of not less than three years." Strohmeier and CNJ, however, admit at page 15 of their OFA that it "could easily take 2 years or more" to overcome the engineering, regulatory and financial obstacles to potentially restoring operations on Segment # 3 of the former line. There would be significant obstacles to addressing the serious public safety, operational and anticipated public objections to the resumption of rail operations on this line after 30 years of non-use. It would require

³ Should the OFA process be permitted to proceed, Conrail would object to the offer for this portion of the line, among other reasons because it would leave Conrail with stranded parcels of property.

Surface Transportation Board
March 12, 2012
Page 4

the establishment of an interchange where none existed previously. The averments of the OFA itself, without the ability to review the purported exhibits, show that CNJ and Strohmeyer cannot meet this service requirement of a "financially responsible person."

For the foregoing reasons, Applicants respectfully request that the Board reject the OFA of CNJ and Strohmeyer as patently inadequate.

Sincerely yours,



Benjamin C. Dunlap, Jr.

BCDjr/jc

cc: Eric S. Strohmeyer (via electronic mail, confirmed via U.S. Mail)
John Enright, Esquire (via electronic mail)